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No. 87-1567

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

SUN PIPE LINE COMPANY,
Petitioner

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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Sun Pipe Line Company (hereinafter "SPL")[1] respectfully submits this reply memorandum to the Memorandum For The United States In Opposition.

1. SPL agrees that a motion for reconsideration under Fed. R. Civ. P. 59(e) should be set aside only for abuse of discretion. However, the leading authority cited by the Solicitor General, *Thomas v. Farmville Mfg.*, 705 F.2d 1307 (11th Cir. 1983), thoroughly supports SPL's position. In that case, the court of appeals held as follows: "The order dismissing the complaint is VACATED and the case is REMANDED to the district court with directions to allow the filing of an amended complaint." *Id.*, 705 F.2d at 1308. The court, citing *Foman v. Davis*, 371 U.S.

1. The petition for a writ of certiorari included SPL's Rule 28.1 listing at pp. ii-iii.

178 (1962), said it was an abuse of discretion not to allow the filing of an amended complaint following dismissal for failure to state a claim. *Id.*

A court would be less likely to abuse its discretion if it failed to allow an amendment to a complaint after trial on the merits or disposition of cross-motions for summary judgment. *Grumman Aircraft Engineering Corp. v. Renegotiation Board*, 482 F.2d 710, 721 (D.C. Cir. 1973), *rev'd on other grounds*, 421 U.S. 168 (1975). However, this is clearly not the situation in the present case.

The Solicitor General's statement (Mem. at 4) that "petitioner does not contend that the court of appeals was incorrect in its resolution of the only question it actually decided: whether the district court abused its discretion in denying the Rule 59(e) motion . . ." is a complete misstatement of SPL's position.

2. The Solicitor General argues that "as the court of appeals explained, petitioner's request for Spittler's testimony failed to conform to EPA requirements," and therefore there was no abuse of discretion in not allowing an amended complaint (Mem. at 4). See footnote 6 of the court of appeals' opinion (A-6). In judicial review of agency action, the adequacy of the request is only one factor. The court of appeals improperly focused on perceived deficiencies in SPL's request to E.P.A. rather than the agency action complained of. It is noteworthy that under the E.P.A. regulations, 40 C.F.R. §2.404(a) (A-19), the agency must still evaluate a "request" when it comes in the form of a subpoena, though a subpoena would contain no explanation as to why it would be in the agency's interest to comply. Judicial review of agency action must therefore focus on the basis for the agency's decision, not the form of the request.

3. The Solicitor General states (Mem. at 4) that SPL "contends in this Court, *for the first time in this proceeding*, that its motion for reconsideration should have been treated as a motion to amend the complaint . . ." (Emphasis supplied.) This is another misstatement. SPL thoroughly set forth its reliance on Rule 15(a) and *Foman v. Davis*, *supra*, when it sought rehearing in the court of appeals. SPL did not do it earlier because E.P.A. never invoked Rule 59(e) or "the abuse of discretion" standard in

its brief to the First Circuit seeking affirmance of the district court's order. E.P.A. argued it should win on the merits (*i.e.*, judicial review was unavailable and/or the agency decision was not arbitrary, capricious, or an abuse of discretion), but the court of appeals raised the Rule 59(e) issue *sua sponte* at oral argument.

In the district court, the "motion for reconsideration" was so labeled because the trial judge suggested a motion for reconsideration (A-38). In the court of appeals, E.P.A., recognizing that substance not form should govern, was content to treat SPL's complaint in the district court as if it had been amended.[2] E.P.A. is now relying on Rule 59(e) for the first time in order to avoid Supreme Court review.

4. The Solicitor General twice refers to the court of appeals' finding of SPL's "lassitude" to support its holding that there was no abuse of discretion in denying "the motion for reconsideration" (Mem. at 3 and 5 n.3). As the court of appeals noted, counsel for SPL first contacted Dr. Spittler in September 1984, but did not seek his deposition until April 1987 (A-7, A-49).

The court of appeals' finding of "lassitude" was an unwarranted inference from the evidence before it. Based on Dr. Spittler's cooperative attitude in 1984, counsel for SPL had no reason to believe there would be any problem in obtaining his testimony if it was needed at a later time. Indeed, the E.P.A. regulations at issue in this case were not promulgated until August 1985. The litigants in the state court, including SPL, were pre-occupied with a liability trial until October 1986, during which discovery on damages was stayed. SPL served appropriate requests for admissions to the Newtown Crossing claimants soon after a schedule was set for the trial of the damage claims. This was not "lassitude."

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2. As the court of appeals recognized, the "motion for reconsideration" included a plea to set aside the agency action as arbitrary and capricious (A-3, A-5). This was SPL's endeavor to provide authority, as requested by its counsel before the district court (A-38). Thus, despite its title, SPL's motion was clearly a motion to vacate the judgment and amend the complaint.

When E.P.A. took the surprising position that it would not permit a deposition of Dr. Spittler to adduce relevant factual evidence, SPL had no choice but to pursue this lawsuit.[3] The seven days between the filing of SPL's original petition and its "motion for reconsideration" (April 29 to May 6, 1987) was not a prejudicial delay to E.P.A. within the meaning of *Foman v. Davis, supra*. There is no evidence the district court relied on the "delay" between 1984 and 1987 as the basis for denying SPL's "motion for reconsideration."

CONCLUSION

For the foregoing reasons, and for the reasons previously argued, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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3. In *Southeastern Pennsylvania Transportation Authority v. General Motors Corp.*, 103 F.R.D. 12 (E.D. Pa. 1984), the court ordered a deposition of a non-party federal employee over objections that D.O.T. regulations similar to those at issue in this case precluded the testimony. The court held that to the extent fact testimony was desired, D.O.T.'s opposition was an unreasonable exercise of administrative discretion. *Id.*, 103 F.R.D. at 14. The court plainly engaged in judicial review of agency action in applying its regulations. *Id.* D.O.T. did not appeal.